A

KASAI REIKO

v.

ANNIE LOR LEE FONG & ORS; PUBLIC BANK BHD (INTERVENER)

B

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[SUIT NO: 22-312-2009]
20 AUGUST 2013

C

TRUSTS: *Constructive trust - Property - Registered proprietors of apartments held properties on trust for actual buyer - False representation - Whether transfers of properties fraudulent and should be set aside - Whether interest of chargee bank not privy to fraud protected under s. 340 of National Land Code - Whether chargee bank bona fide purchaser for valuable consideration and had acquired indefeasible interest*

D

LAND LAW: *Sale and purchase - Transfer purchase of properties in Malaysia by foreigner - False representation that properties could only be registered in name of Malaysian - Whether transfer to Malaysian tainted with fraud - Whether Malaysian held properties on constructive trust*

E

The plaintiff was an elderly Japanese tourist who intended to buy two apartments in Cameron Highlands under the Malaysia My Second Home Programme ('MM2H'). She met the second

F

defendant ('Ikeda') who told the plaintiff, falsely, that without a visa under the MM2H, she could not purchase the apartments in her own name but she could buy them under the name of a Malaysian. The plaintiff agreed with Ikeda's suggestion that the apartments ('G15' and 'G16') be registered in the name of

G

defendant 1(a) ('Annie'). Over the course of a year, the plaintiff paid Ikeda RM611,800 to be used for the purchase of G15 and G16 as well as one other apartment ('H-22'). G15 and G16 were eventually registered in the names of Annie and her son, Valen ('defendant 1(b)'). When she later discovered that she could have

H

bought the apartments in her own name, the plaintiff told Ikeda to have G15 and G16 transferred into her name. Ikeda failed to carry out the plaintiff's request and absconded with about RM178,000 out of the total monies she had paid him. The purchase of H-22 never materialised. The plaintiff began occupying

I

G15 and although she had the keys to G16 as well, Annie changed the lock and keys to G16 and began letting that apartment out to tourists on a daily-rated basis. The plaintiff also discovered that Annie had charged G15 to Public Bank Berhad, the intervenor herein, to obtain working capital. In the instant action, the plaintiff sought a declaration that (i) she was the rightful owner of G15 and G16; (ii) damages for fraud against all the defendants; (iii) damages against Annie and Valen for breach of trust as constructive trustees; and (iv) an order that the defendants be restrained from dealing in any manner whatsoever with the two apartments. Ikeda, although served with the writ and statement of claim, did not enter appearance or participate in the trial. At the conclusion of the plaintiff's case, Annie and Valen, submitted that they had no case to answer.

Held (granting plaintiff declarations and orders sought together with judgment for RM178,000; ordering Annie and Valen to transfer G15 and G16 to plaintiff and to pay RM65,000 in damages to plaintiff and to redeem G15 from the chargee; in event plaintiff redeemed property, ordering judgment for redemption sum to be deemed to have been entered against Annie and Valen):

(1) Annie knew or ought to have known that she was holding the subject properties on trust for the plaintiff but she chose to ignore it altogether and in fact charged G15 to the bank without the plaintiff's knowledge or consent. When the plaintiff requested for the subject properties to be transferred to her, Annie refused. The transfers of the subject properties to the first defendants ought to be set aside as they were tainted with fraud against the plaintiff who had paid for their full purchase price on the understanding that the transfers to Annie was only until the plaintiff could obtain her visa under the MM2H as that was what was told to her by Ikeda, whose representation was later found to be false. (para 57)

(2) The purchase price for G15 and G16 was not paid by Annie and the uncontradicted evidence showed the monies came from the plaintiff to Ikeda with Annie's knowledge. By failing to transfer the two apartments to the plaintiff, and in the absence of any evidence that the first defendants held the apartments on trust for Ikeda and on Ikeda's failure to turn

A up to defend the plaintiff's claim against him, the court was constrained to hold that Annie and Valen were liable to the plaintiff as constructive trustees of the two apartments. (paras 39 & 49)

B **(3)** There was no evidence that the chargee bank knew about the fraud, much less that it was a party to conspiracy to defraud the plaintiff. There was nothing to suggest to the bank that the first defendants were trustees and no caveat was lodged by the plaintiff at the material time when the bank did a C search on the titles to ensure that they were free from encumbrances before the registration of the charge. The bank's interest was protected under s. 340(1) of the National Land Code. It was a *bona fide* purchaser for valuable consideration and its interest was indefeasible. (paras 52-54)

D **Case(s) referred to:**

Choong Kwee Sang v. Choong Kwee Keong [2008] 5 CLJ 229 CA ***(refd)***

Govindasamy Muthulingam v. Ooi Kee Chye & Anor [2012] 1 CLJ 875 HC ***(refd)***

Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor E *[2008] 2 CLJ 369* ***(refd)***

Ng Ben Thong & 2 Ors v. Krishnan a/l Arumugam [1997] 1 LNS 85 HC ***(refd)***

OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim [1999] 2 CLJ 949 CA ***(refd)***

Ooi Choon Lye v. Lim Boon Kheng & Ors [1971] 1 LNS 99 FC ***(refd)***

F *Owe Then Kooi v. Au Thiam Seng & Anor & Another Case [1990] 1 CLJ 311; [1990] 2 CLJ (Rep) 600 HC* ***(refd)***

Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors and Other Appeals [2008] 6 CLJ 626 CA ***(refd)***

Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip [1996] 2 CLJ 380 G *PC* ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 CA ***(refd)***

Teh Cheng Choo v. Malayan Banking Bhd [2009] 5 CLJ 463 CA ***(refd)***

H **Legislation referred to:**

Criminal Procedure Code, s. 112

Evidence Act 1950, s. 5

National Land Code, ss. 5, 340(1), (2)(a), (b), (3)

I

For the plaintiff - Lucia Menta; M/s Darshan Singh & Co
For the 1st defendant (a) - Chan Ho Chin; M/s LW Ong & Chan
For the 1st defendant (b) - Cheah SV; M/s KH Wong, Chin & Cheah
For the Intervener - Poh Choo Hoe (Violet Liang with him); M/s Shook Lin & Bok

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

[1] The plaintiff is a Japanese. She is now 79 years old. She retired some 24 years ago when she reached 55. She was working as an office clerk in a planning company. She speaks no English and only Japanese. She came to Malaysia as a tourist in 2004 with a friend Mrs Michiko Masaki. She visited Cameron Highlands and fell in love with the place. They stayed two nights at the Heritage Hotel in Tanah Rata, Cameron Highlands.

[2] She thought of her retirement plans. She had the idea of buying an apartment in Cameron Highlands to stay under the Malaysia My Second Home Programme (MM2H). Looking at her savings and the price of the apartments there, she calculated that she could afford to buy two units: one to stay and one to let out and receive a constant stream of income.

[3] She met a fellow countryman called Ikeda Masami, the second defendant (D2) on 8 December 2004. He was especially kind to her and having known of her intentions, he introduced her to two apartments for sale in Heritage Hotel itself. He told her that without a visa under the MM2H she cannot purchase the apartments and so the purchase has to be registered under a local Malaysian name. He introduced her to his local friend Annie Lor, who is the defendant 1(a). The plaintiff met up with the second defendant (D2) and the defendant 1(a) (D1a) for about seven to eight times. The representation given by D1a to the plaintiff was that the two apartments would be registered in the name of D1a.

Problem

[4] The two units were identified as G-15 and G-16, Greenhill Resort Apartment, Heritage Hotel, Tanah Rata, Cameron Highlands, Pahang Darul Makmur. She was shown the two apartments by one Mrs Tan, a representative and wife of a

A Director of Tan Say Theam & Sons Sdn Bhd, the owner and intended seller of the apartments. Together with her were her friend Michiko, Annie Lor (D1a) and Ikeda Masami (D2).

[5] On the same day 17 December 2004, she paid the deposit B of ¥150,000 (about RM4,500) and USD250 to D2 and D2 gave her a receipt. There was a celebration at a restaurant called the Hong Kong Restaurant operated by D1a and 2 photographs were taken and exhibited in court, one showing D1a, D2 and the plaintiff at the restaurant and another showing D2, Michiko and C the plaintiff shaking hands and happy that the plaintiff had purchased the two apartments. Little did she realise at that time that her happiness would soon turn into a most harrowing experience for her.

D **[6]** When she went back to Japan, at the request of D2, she paid further sums of money to D2 in cash. The sum was ¥12,360,000 (about RM374,600) for the two apartments for which D2 gave a handwritten receipt in Japanese (exh. P4 and the translation exh. P4T). Charm and charisma must have characterised his life for when D2 proposed a further purchase of E another unit of apartment H-22, the plaintiff agreed and paid him in cash when he came to Japan on 14 June 2005. The sum was for ¥4,580,000 (about RM138,800) for which he gave a receipt in Japanese.

F **[7]** Believing D2's representation that the price for the unit had gone up, the plaintiff transmitted further sums of money in D2's account; on 2 September 2005 the sum of ¥3,000,000 (about RM90,900) to D2's account in No. 1030208 with Mitsui-Sumitomo Bank in Ooita Branch following his request. Again on 4 November G 2005, she transmitted ¥100,000 (about RM3,000) to him in the same account.

[8] All in she had transferred the sum of ¥20,190,000 which is equivalent to RM611,800 to D2.

H **[9]** The purchase price for apartment G15 was RM205,000 and that for apartment G16 was RM228,100.

[10] She was later to discover that there was no prohibition against her purchasing the apartments in her name so long as the I purchase price was more than RM150,000. She asked for the two apartments G-15 and G-16 to be transferred back to her name. According to her D2 said he would ask D1a to do that but to

no avail. She discovered that the two units have now been registered in the names of D1a and D1b, one Valen Ng Wai Loon who is the son of D1a. D1a and D1b shall be collectively referred to as the first defendants.

[11] The plaintiff subsequently lodged a caveat over the two apartments. As for the unit H-22, the sale was not effected at all. D2 could not be contacted at all and for all intents and purposes has absconded.

Prayer

[12] She sued to get back her two units and for damages for fraud against the defendants and for damages for breach of trust as constructive trustees against D1a and D1b. She prayed for a declaration that she is the rightful owner of the two units and that the defendants be restrained from dealing with the said units. The unit G-15 has been charged to Public Bank Berhad for a loan for working capital and so the bank applied to intervene.

[13] There was no counter claim by the defendants. D1a and D1b have also not counter claimed for rental for the occupation by the plaintiff of unit G15 or for vacant possession of the said unit.

[14] D2 though duly served with the writ and statement of claim, did not enter appearance. Neither was he called as a witness by D1a.

Parol and Paper Evidence

[15] The plaintiff gave evidence as to what happened from the time she first visited Cameron Highlands and her decision to buy two units of apartments there to how she met D1a and D2. She gave evidence of the details of payments supported by documentary evidence of receipts or evidence of transfer from her bank account to D2. A summary of the various payments received by D2 is reproduced below:

No.	Date	Particulars	Amount (¥)	Amount (RM)	Exhibit
(i)	17-12-2004	Cash	¥150,000.00	RM4,500.00	P1
(ii)	19-01-2005	To buy G-15 & G-16	¥12,000,000.00 ¥360,000.00	RM363,700.00 RM10,900.00	P4 P4

A	(iii)	14-06-2005	To buy H-22	¥4,580,000.00	RM138,800.00	P1
	(iv)	02-09-2005	Through JA Bank to Mitsuo Sumitomo	¥3,000,000.00	RM90,900.00	P6
B	(v)	04-11-2005	Through JA Bank to Account No. 1030208 of the 2nd Defendant	¥100,000.00	RM3,000.00	P6
C				¥20,190,000.00	RM611,800.00	

[16] There can be no dispute that the strata titles to the two units in G15 and G16 are in the name of D1a and her son D1b.

D

[17] The plaintiff also gave evidence that after the purchase of the two apartments, she stayed at unit G15 and unit G16 was empty. She has the keys to both the units. However on 3 October 2008 D1a broke the lock to unit G16 and changed the keys to the said unit and starting letting out the said unit G16 to tourists. E According to her D1a let out the apartment daily at RM300 per day on weekday and RM450 for the 3-room apartment per day on holidays.

[18] PW2 Kyo Hoshino, a fellow Japanese who alerted her to the F fact that she has been cheated, gave evidence of the various meetings he had with the plaintiff and D1a, D1a's mother Madam Chan and also PW3 one Laura Lau Siew Cheng. PW2 acted as an interpreter for the plaintiff in all these meetings. He is also a retiree who is here under MM2H visa. He was also the Honorary G Advisor to the Penang State Government's Tourism Action Council to promote MM2H in Japan. The plaintiff had sought his help with respect to her application for her visa under MM2H. According to her D2 had told her that the two apartments could not be registered in her name until her visa under MM2H had H been obtained. She understood the visa under MM2H to be for ten years in two stages of five years. It was PW2 that told her that there was no such necessity and that she had been cheated! She confronted D2 with some Japanese friends on 14 March 2006 to request D2 to transfer the two units back to her. D2 told her I that he would ask D1a to do so. After that D2 left for Thailand

and he came back a week later on 21 March 2006 and gave her a handwritten note in Japanese dated 23 March 2006 saying that he had told D1a and she had agreed to transfer the two apartments back to her. After that she could not contact him anymore and he would appear to have absconded.

[19] PW3 Laura Lau, is the General Manager of Heritage Hotel where the two apartments are at. As she knows D1a, PW2 had asked for her help to resolve the problem that had arisen. As D1a does not speak English well, PW3 had also acted as her interpreter in the meetings that involved the plaintiff, PW2, D1a and D1a's mother to resolve the matter. She kept minutes of the meetings as well which minutes were produced as exhibits in court. At one of the meetings, D1a told the plaintiff, PW2 and PW3 that D2 had paid RM400,000 into her account for her to purchase the two apartments.

[20] At one time there was even the suggestion that the two units be transferred back to the plaintiff but that as the plaintiff has been staying in unit G15, she should be allowed to stay there until she leaves for Japan for good and at that time the unit be transferred to D1a. That was out of sympathy on the plaintiff's part as D1a said during the meetings that D2 owed her RM170,000. However, even then D2 did not agree to settle the matter.

[21] The plaintiff had no alternative but to file her claim in court. She lodged no less than four police reports and the investigating officer ASP Rahmat bin Zakaria gave evidence of the interview he had with D1a and the s. 112 statement of the Criminal Procedure Code (CPC) that he had taken from D1a on 11 May 2006.

[22] The ASP said that the police reports lodged by the plaintiff were with respect to how she had been cheated by D2 and D1a. The ASP confirmed that D1a did not make any police report concerning the case. One would have expected that if she had been cheated too by D2 she would have made her police report.

[23] There were some objections by learned counsel for D1a and D1b to the admissibility of a s. 112 statement for the purpose of a civil trial. Parties agreed that I should hear submissions before ruling on its admissibility. After hearing submissions and after ruling that the statement was admissible, PW4 the ASP was recalled to tender the statement as exh. PSP4.

[24] The evidence of ASP Rahmat and as evidenced from her s. 112 statement was D1a admitted she did not purchase the two units of apartment in G15 and G16 or paid for the purchase price. She said the purchase price was paid by D2 and that she had allowed her name to be used as his nominee. She also admitted that she does not own the two apartments. From his investigation he was satisfied that the plaintiff had paid the purchase price to D2 for the purchase of the two units of apartments and that D2 had informed the plaintiff that the apartments could not be registered in her name as she did not have a MM2H visa and that the apartments will be registered in the name of his friend D1a whom the plaintiff had met a few times after the plaintiff was introduced to D1a by D2. The parties have met a few times at D1a's Hong Kong Restaurant and the plaintiff is certainly not unknown to D1a. He explained the meaning of a s. 112 statement to D1a in Bahasa Malaysia and she understood him and further that she was obliged to tell the truth in the statement.

[25] From PW4's investigation, D2 could not be located and is believed to have left for Thailand.

[26] After the plaintiff had called four witnesses including herself, the plaintiff through her counsel, Miss Lucia Minta, closed her case. Surprisingly counsel for D1a and D1b, Mr Chan Ho Chin and Mr S V Cheah respectively, submitted no case to answer. The usual caution was highlighted to them that by so doing they would have elected not to call any witnesses even if the court were to find in favour of the plaintiff to which both counsel admitted so and understood their election not to call any witnesses. I said 'surprisingly' because both D1a and her mother were in court for most of the proceedings and also when the plaintiff closed her case.

[27] It would be opportune for me to state at this juncture that the bulk of the evidence of PW1 the plaintiff and PW4, the whole of the evidence of PW2 and PW3, were heard by a previous Judicial Commissioner who at the time of continued hearing, had gone on transfer. The Honourable Chief Judge of Malaya had directed me to hear the case. Learned counsel for D1a and D1b had objected to me hearing the case on ground that I had not had the benefit of observing the demeanour of the witnesses. Their further written request to the Honourable Chief Judge of

Malaya to have the case heard before the previous Judicial Commissioner had been rejected. Before me PW1 was recalled to tender one police report and PW4 recalled to tender the s. 112 statement of D1a. As it turned out since D1a and D1b had decided to submit a no case to answer, the evidence as summarised above, remained uncontradicted.

Preliminary Point

[28] There was objection taken to the admissibility of a s. 112 CPC Statement given by D1a to ASP Rahmat PW4. In a civil trial the test of admissibility is relevancy. I have no reason to doubt the evidence of ASP Rahmat that D1a did give a statement under s. 112 CPC to him and that she did sign the document. Section 5 of the Evidence Act 1950 reads:

> Section 5. Evidence may be given of facts in issue and relevant facts.
>
> Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[29] As the statement was taken following a police report lodged by the plaintiff which report have been admitted as evidence in this civil trial, the statement would be relevant in showing the frame of mind of D1a and more so when under a s. 112 statement she is obliged to tell the truth.

[30] In *Ooi Choon Lye v. Lim Boon Kheng & Ors* [1971] 1 LNS 99; [1972] 1 MLJ 153 the Federal Court speaking through Gill FJ said:

> I do not think there is any prohibition against its (a statement taken by the police in the course of his investigation) use in a civil case, so long as it is relevant to the subject matter of the case. The police may refuse to furnish a party to a civil action with a copy of such a statement, which I think they are entitled to do, but that is no reason why, if the deputy public prosecutor chooses to supply it, as he did in this case, it cannot be used for the purpose of cross-examination.

[31] The ASP was cross-examined by the first defendants' counsel and D1a could always go into the witness box later to explain the answers given to questions posed by the ASP. Here

as stated they chose not to give any evidence. As far as weight is concerned, this would depend on the testimony of ASP Rahmat himself and how he would fare under cross-examination and also the evidence of D1a who gave the statement when she would later give her evidence and how she would fare under cross-examination.

[32] I do not see how she can be prejudiced by the admission of the statement as she has every opportunity of challenging or clarifying its contents by going into the witness box. After hearing submissions and for the reasons given above, I had allowed the statement to be admitted and to be marked as exh. P30.

Principles

Whether The First Defendants Are Liable As Constructive Trustees And For Breach Of Trust Towards The Plaintiff

[33] Based on the evidence of the plaintiff and the corroborative evidence of PW2, PW3 and PW4, I am more than satisfied that the plaintiff has proved beyond a reasonable doubt fraud on the part of D2. He did not enter appearance and as I said before, it looks like he has absconded.

[34] As for D1a, she has not called D2 to give evidence in her favour and she has also not put in a claim against D2 if indeed she was an innocent victim. In fact the evidence against her which she has not denied was that she did not pay for the two apartments and that D2 had transferred RM400,000 into her account for her to purchase the two apartments. The uncontradicted evidence of the plaintiff is that D1a knew that the monies had come from the plaintiff for the purchase of the two apartments and that they were to be registered in her name on trust until the plaintiff obtained her visa under MM2H Programme. She had taken liberty to register the apartments in her name and her son's name as D1b. More than that she has subsequently charged the unit G15 to the Bank for a loan for working capital.

[35] All these evidence was not rebutted by D1a and D1b. All she needed was to go into the witness box, take the oath to tell the truth and tell the court her version as to what happened. There is something to be said about a defendant being present in court with her witnesses but refusing to go into the witness box

or take the stand. Indeed case law tells us that an adverse inference ought to be drawn against her and more so when there is no evidence from her that she had paid for the two apartments herself. There is something liberating and even life-saving in telling the truth and when a defendant refuses to take the stand in the light of the damning evidence against her as in this case, it can only mean that either she is afraid to confront the truth or that she really has nothing to rebut the plaintiff's case. Fearlessness is the result of being in the side of truth and fear is because of falsehood. There is no fear if one is in the same side as truth and more so when one is defending one's property in the two apartments.

[36] Her defence was *inter alia* that she had taken a loan to purchase the unit G15 but the evidence adduced by the bank was that the loan of RM184,000 was released to her and not to the vendor of the property. It was a loan taken as a working capital for her business. She denied that she and her son held the two apartments in trust for the plaintiff. She even alleged that the unit G15 was being let out at RM300 per day to the plaintiff but then the plaintiff had not been paying any rental to D1a and D1a has not made any claim for rental. She also denied that she had broken the lock to unit G16 and that the keys actually have been given to her by the vendor. Other than that the rest of her defence was a bare denial including the allegation that the monies transmitted to D2 by the plaintiff was meant for the purchase of another unit H22. The defence of her son in D1b followed her similar stand.

[37] If her stand is that she is holding the two apartments in trust for D2, then she has not pleaded that nor given evidence on that. If her stand is that the two apartments are a gift to her from D2, again she has not pleaded that nor given evidence on that. If her stand is that she had paid for the two apartments, then she has not given any evidence on that. In fact she is completely silent about the unit G16 which she has not explained how she landed up being registered owner.

[38] What was observed in *Choong Kwee Sang v. Choong Kwee Keong* [2008] 5 CLJ 229 at p. 247; [2008] 5 AMR 394 at p. 407 is of relevance here:

> (a) *Where A makes a voluntary payment to B or pays wholly or in part for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to*

> *make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions.* It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer.
>
> [76] Though the appellant relied on the authority of *Loo Hon Kong v Loo Kim Lin* [2004] 4 AMR 591 at pp 597-598; [2004] 4 CLJ 1 at pp 9-10 to support his claim, the above authority is of little help to him. This is simply because in the above case, the fact that the plaintiff paid for the entire purchase price for the land was undisputed and clearly established. The issue in that case, was that, since the land was registered in the defendant's name thus vesting legal ownership in the defendant, and because the relationship between the plaintiff and defendant did not come within one of the categories recognised by equity as creating a presumption of advancement in favour of the defendant (as holder of the legal title), the beneficial ownership results to the plaintiff. However, in the instant appeal, the appellant cannot have recourse to the above authority to support him because the fundamental issue of whether the appellant paid for the subject properties had not even been established by him. (emphasis added)

[39] This is a fit case for the application of the doctrine of constructive trust where the purchase price to the two apartments were not paid by D1a and in fact, it has been shown from uncontradicted evidence that it had come from the plaintiff to D2 with the knowledge of D1a. In *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363, it was observed as follows in the headnotes:

> At all material times the deceased and the 1st defendant were friends and had some business dealings from time to time. The plaintiffs claimed that the 1st defendant had not paid the purchase price to the deceased for the said shares. Alternatively, the plaintiffs averred that the transfer of the said shares to the 1st defendant was made without any consideration at all and it was unlawful and unconscionable for the 1st defendant to retain ownership of the said shares. The 1st defendant contended that it was agreed between the deceased and him that pursuant to the management buy-out of certain companies, the said shares be given to the 1st defendant. The learned judge of the High Court allowed the plaintiffs' claim and ordered that all the shares together with all dividends arising therefrom to be returned by the defendants to the plaintiffs. The learned judge also held that the

1st defendant held the said shares on trust for the deceased and that the 3rd, 4th and 5th defendants were constructive trustees of the said 4 million shares held in their respective names for the deceased's estate. Hence, this appeal.

(2) There will be unjust enrichment if the defendants were allowed to keep the said shares. The learned judge was right in imputing or imposing a constructive trust whereby the 1st defendant held the said shares on trust for the deceased's estate. (para 95)

This trust does not need to be in writing. The law will impute or impose a constructive trust by which he held the said shares and also the bonus issue and any other accretions relating to the said shares on trust for the deceased's estate. (paras 96 & 97)

(4) The transfer of the said shares was not intended to operate as a gift. There was clearly no intention of a gift. The beneficial interest never left the deceased with the result that there was no disposition of that interest in the said shares. Absence of writing does not preclude the deceased as transferor from asserting his entitlement in equity. It is unconscionable after the failure to make payment for the said shares for the 1st defendant to assert his rights as registered owner of the said shares. He failed to fulfill that condition. A failure of consideration occurred as there had been a failure of performance by the 1st defendant of his obligation under an arrangement which was initially binding. Under the circumstances the learned judge was correct by way of remedy to impose a constructive trust on the 1st defendant who knowingly retained property of which the deceased has been unjustly deprived of. (para 99)

[40] Her counsel would have instructed her that her pleadings in her defence and that of her son D1b are not evidence and that no matter how credible it may appear, she and her son must still give evidence on oath and be subject to the crucible of cross-examination. The first defendants cannot rely on their pleadings in their defence to refute the plaintiff's claim. Pleadings are not a substitute for adducing evidence as highlighted in *Ng Ben Thong & 2 Ors v. Krishnan a/l Arumugam* [1997] 1 LNS 85; [1998] 5 MLJ 579 at p. 583 where it was held that:

I am asked by the defence to rely on its pleadings and to dismiss this case. *The defendant must realize that pleadings is not evidence. It is a bare averment of a party's case. The party has to adduce evidence to substantiate its pleadings. Whilst pleadings cannot become evidence in*

A *the absence of evidence being led in court, similarly evidence cannot be led outside the pleadings.* Pleadings and evidence become the heart and soul of a case. They complement each other.

In the case before me for reasons best known to himself, the defendant did not turn up in court. An opportunity was given
B when the case was adjourned, before his counsel commenced cross examination. Both counsels went to the *locus in quo*. Surely if the defendant was interested in defending this case, he would have at least seen his counsel and recognized him and could have attended court the next day. *In the circumstances, the defendant's*
C *pleadings, namely his defence, remains as bare allegations, unsubstantiated by the live-giving evidence that must of necessity course through the veins of his case to sustain in. Bereft of any evidence, the defendant's case was a non-starter.* On the other hand, the case for the plaintiffs was fully substantiated by the evidence of both PW1 and PW2. Each of them gave their evidence very candidly and
D denied the averments of the defence. I have no reasons to doubt their evidence. (emphasis added)

[41] Some things loom large in the overall scheme of sieving through the evidence adduced by the plaintiff and satisfying
E oneself of the plaintiff's claim in the absence of any evidence from the defendants. First the evidence of the plaintiff is presumed to be true unless it is inherently incredible and second an adverse inference ought to be drawn against the silent defendant who has studiously taken the stand not to give evidence by submitting no
F case to answer. The Federal Court speaking through His Lordship Gopal Sri Ram FCJ in *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 at p. 398; [2009] 6 MLJ 751 at p. 759 has given us a useful guide to follow when there is no evidence forthcoming from a defendant:

G In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v. Bachan*
H *Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has
I failed to prove his case merely because the judge does not

believe his evidence. *At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.*

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these *circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way.* He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. *Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference.* See *Guthrie Sdn Bhd v. Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: 'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.' (emphasis added)

[42] As was succinctly stated by His Lordship Suriyadi JCA in *Mohd Nor Afandi Mohamed Junus v. Rahman Shah Alang Ibrahim & Anor* [2008] 2 CLJ 369; [2008] 3 MLJ 81:

[32] ... It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, **the effect is also that all the evidence led by the plaintiff must be assumed to be true.** This proposition of law was succinctly

said in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v. Tan Lip Eng & Anor* [1997] 3 MLJ 693 at p 712:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true. (emphasis added)

[43] It was observed too that plaintiff has stated that D1a is D2's mistress to which D1a has denied in her defence and in answer thereto she had stated that she was just a special friend. Whatever it is D2 must have trusted D1a enough to allow D1a to be the registered owner of the two apartments. If indeed D1a also could not contact D2, then she needs to come and give evidence to that effect. So too her allegation that D2 owes her RM170,000 and her fear that one day D2 might come back and claim the two apartments from her. However she cannot vacillate between whether she is holding the apartments in trust for the plaintiff, or that she is holding the apartments in trust for D2 or that the apartments are a gift from D2 to her.

[44] At any rate D2 had not entered appearance at all. It is not for D1a to say that the writ and statement of claim had not been served on D1 at his address used for correspondence which is the address of Hong Kong Restaurant which AR Card was returned duly acknowledged. The only one who has *locus* to challenge the validity of service would be D2 himself. Perhaps D1a can inform D2 about it for she knows him as a special friend. One would suppose that she would stay in constant touch with him to nurture that special element in their friendship.

[45] We are aware that when a person has advanced the purchase price of a property and that property is not registered in that person's name there is a presumption that the person registered as the buyer and new owner is holding it in trust for the one who has come out with the full purchase price of the property.

[46] The stand taken by learned counsel for D1a and D1b is that the plaintiff's evidence is so unsatisfactory that she has not proved her claim against their clients. Both learned counsel for D1a and D1b, Mr H C Chan and Mr S V Cheah respectively, drew support from the case of *Govindasamy Muthulingam v. Ooi*

Kee Chye & Anor [2012] 1 CLJ 875 at p. 891; [2012] 7 MLJ 254 at p. 270 where His Lordship Chew Soo Hoo JC, *inter alia*, held that:

> However, *the fact that a defendant elects not to testify, does not relieve the plaintiff from his burden of having to prove his case in accordance with the standard of proof required by the law and in line with his pleaded case*. Since the plaintiff herein had given evidence of an entirely different version of his alleged acquisition of the said land from his pleaded case for which this court must necessarily reject, the plaintiff had deprived this court of its duty to presume his evidence to be true and to accept his evidence as true. *By failing to prove his own pleaded case, the plaintiff had given up his right for his evidence to be presumed to be true and to be accepted as true as against a non-testifying second defendant*. Similarly, an adverse inference drawn against the second defendant would have no effect in the circumstances. Therefore, when the plaintiff had failed to prove his case, the second defendant was entitled to refrain from leading evidence but to submit of a no case to answer. When the plaintiff had failed in his burden of proof, I am of the view that there is no onus for the second defendant to rebut. (emphasis added)

[47] With respect I do not agree that the evidence adduced by the plaintiff and her witnesses have been so unsatisfactory that the plaintiff has failed to discharge the standard and burden of proof that reposed with her. The evidence that she gave has a ring of truth and when one looks at what is at stake, ie the ownership of the two apartments and the allegation of a breach of trust against D1a and D1b, it behoves them to go into the witness box and take the stand that they are totally unaware of the plaintiff's interest and that they were holding the apartments in trust for D2. Even assuming that they had done that, in the absence of evidence from D2 refuting the plaintiff's evidence that the full purchase price had come from the plaintiff under the circumstance where D2 had told her that she could not be the registered owner until she has obtained her visa under MM2H Programme, this court would be inclined to conclude that the plaintiff has proved her claim against D2 and consequently against D1a and D1b where breach of a constructive trust is concerned. As was held in *Royal Brunei Airlines Sdn Bhd v. Tan Kok Ming Philip* [1996] 2 CLJ 380 at pp. 381; [1995] 3 MLJ 74 at pp. 74-75 and as summarised in the headnotes:

A (1) A person who dishonestly procures or assists in a breach of trust or fiduciary obligation is liable in equity to make good any resulting loss. Although dishonesty is a necessary and sufficient ingredient of accessory liability, the breach of trust itself need not be a dishonest and fraudulent breach of trust by the trustee. Accordingly, for liability to attach to the accessory, it was not
B necessary that the trustee was acting dishonestly.

(2) BLT had committed a breach of trust when it used the money in the conduct of its business instead of simply deducting its commission and holding the balance until it paid the airline. By
C causing or permitting BLT to apply the money in a way he knew was not authorized by the trust of which BLT was trustee, the respondent had knowingly assisted in the breach of trust. Both the respondent and BLT had acted dishonestly and therefore the respondent was liable as a constructive trustee for BLT's default in its payment to the airline.

D

[48] Indeed D1a and D1b do not have to worry that D2 would come back in the future to claim back the two apartments for D2 would have to set aside the judgment that may be entered against him in his absence. Really D1a and D1b would have more cause
E to worry if their stand is that they are holding the apartments in trust for D2 if they have failed to give evidence in the witness box of that fact assuming for a moment that D2 had not gone missing to evade the plaintiff's claim but that he was gallivanting round the world in search of adventure!

F

[49] By failing to transfer back the two apartments to the plaintiff when they have not paid the purchase price for it and when they have not given any evidence that they hold the apartments in trust for D2 and when D2 has not appeared to defend the plaintiff's
G claim against him, I am constrained to hold that D1a and D1b are liable as constructive trustees of the two apartments and an order shall lie that they do transfer back the two apartments to the plaintiff.

[50] I shall deal with the ancillary orders later but right now, I
H must address the problem created by D1a and D1b in subsequently charging the unit G15 to the Bank and the position of the bank *vis-a-vis* the plaintiff.

I

Whether The Bank Has An Indefeasible Charge Over Apartment G15 In The Circumstance Of The Case

[51] The plaintiff's contention was that the officers of the bank who came to testify were low-ranking officers and as such an adverse inference should be drawn against the bank. With respect I cannot agree. As pointed out by learned counsel for the intervener bank, Mr Poh Choo Hoe, the two witnesses were material witnesses who had knowledge of the approval of the loan and the processing of the loan. IW1, Mr Au Yeong Tuck Fei, was the branch manager at the material time. He gave evidence that he had no knowledge whatsoever of the claim of the plaintiff on the unit G15. He approved the loan as a working capital together with IW2 his officer in charged of the credit department by the name of Mr Mogan a/l Kalianan. IW2 was the one who interviewed D1a and processed the loan. IW1 as the branch manager signed the loan documentation. The facilities agreement was dated 20 December 2006 and the charge dated 12 December 2006. Both did not know of the dispute between the plaintiff and the defendants. Both D1a and D1b became registered owners of G15 on 20 November 2006. On 22 November 2006 at the request of the first defendants, the Bank had granted a credit facility to them for working capital purpose.

[52] In fact the dispute did not arise until March 2007 when the plaintiff approached D2 to request for a transfer back of the two apartments to her from D1a. If the transfer back to the plaintiff had been effected then and the charge fully discharged, there would have been no problem at all. There is no evidence whatsoever that the bank knew about the fraud much less be a party to conspiracy to defraud the plaintiff. In fact both the witnesses of the bank do not know and have no dealings with the plaintiff. There was nothing to suggest that D1a and D1b were trustees as they were not so registered against the title to unit G15.

[53] The banker's charge over the apartment was registered on 28 December 2006 whereas the plaintiff's private caveat over the apartment was entered only on 8 October 2009. D1a and D1b have declared by way of a statutory declaration dated 12 December 2006 when applying for a loan that the purpose of the said loan was for working capital. There was no caveat lodged by the

A plaintiff at the material time when a search was done by the bank's solicitors to ensure that the apartment concerned was free from all encumbrances and caveats when a charge was to be created in favour of the bank.

B **[54]** That being the case the bank as a chargee is entitled to the protection afforded them under s. 340(1) of the National Land Code (NLC) in the absence of fraud to which the bank was privy under s. 340(2)(a) NLC. They have parted with the loan to first defendants and have paid valuable consideration for the charge C created. I am more than satisfied that the bank is a *bona fide* purchaser for valuable consideration. Whilst the continuing refusal of D1a and D1b to transfer the apartment back to the plaintiff is fraudulent and the transfer of the apartment to them from the vendor ought to be set aside in favour of the plaintiff, yet the D bank's title is indefeasible.

[55] In *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 the reason the charge in that case was set aside was because the chargee bank was an immediate holder of interest in a case where the charge was created through a forgery under s. 340(2)(b) NLC. E Hence the Federal Court held that since the chargee bank was an immediate holder of interest, the chargee bank in that case could not avail itself of the proviso to s. 340(3) NLC.

[56] However the Federal Court in *Tan Ying Hong*'s (*supra*) went F on to affirm the position of the law with respect to chargee banks that are subsequent holders of interest in that they can avail themselves of the proviso to s. 340(3) of the NLC. Section 340 NLC is reproduced here in full for its full terms and effects:

G Section 340. Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being H registered, shall, subject to the following provisions of this section, be **indefeasible**.

(2) The title or interest of any such person or body shall not be indefeasible -

I (a) in any case of **fraud or misrepresentation** to which the person or body, or any agent of the person or body, **was a party or privy**; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2) -

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser. (emphasis added)

[57] In our case, whether the bank is the holder of an immediate interest who was not a party or privy to the fraud of the first defendants or that the bank is a subsequent holder of interest, the result is the same. It was argued by the bank's counsel that the bank is a subsequent holder of interest for the reason that the subject land was first transferred to the first defendants and thereafter the first defendants charged it to the bank. D1a knew or ought to have known that she was holding the subject land in trust for the plaintiff but chose to ignore it altogether and in fact took advantage of it by using it as a security for a charge without the knowledge and consent of the plaintiff. Worse still, when the plaintiff requested for the subject land to be transferred back to her she refused. The transfer of the subject land to the first defendants ought to be set aside as it is tainted with fraud against the plaintiff who paid for the full purchase price on the understanding that the transfer to D1a was only until the plaintiff could obtain her visa under MM2H as that was what was told her by D2 and which representation was later found to be false.

[58] However the first defendants have subsequent to their becoming owners, charged the subject land to the bank. The bank here may be said to have come within the meaning of a "purchaser in good faith and for valuable consideration" in the proviso to s. 340(3) NLC. Section 5 NLC defines "purchaser" as a person or body who in good faith and for valuable consideration acquires title to, or any interest in land. I agree with learned counsel for the bank that the term "purchaser" in the proviso is not limited to the person or body that has acquired title to the subject land but extends to those taking an interest in the land, eg, a lessee or a chargee (the intervener bank in the present case).

[59] The facts of this case are not too dissimilar to that of *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949; [1999] 2 MLJ 511. While in the present case the first transfer was effected fraudulently, in *OCBC*'s case (*supra*) it was effected through forgery. In both cases a charge was subsequently created in favour of a bank. That case was where one Ng See Chow (who was the registered owner of the subject property) was granted credit facility by OCBC Bank (M) Berhad ("OCBC"). Ng See Chow then charged the subject property to OCBC as security for repayment of the said credit facility. Subsequently, one Ng Kim Hwa claimed to be the true owner of the subject property and contended that Ng See Chow obtained his title by forgery. Ng Kim Hwa applied to set aside the title of Ng See Chow to the subject property and the application was allowed by the High Court and affirmed by the Court of Appeal.

[60] The Federal Court had occasion when deciding *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269 at p. 286 to correct the error in the decision of Court of Appeal in *OCBC Bank (Malaysia) Bhd v. Pendaftar Hakmilik Negeri Johor Darul Takzim* [1999] 2 CLJ 949; [1999] 2 MLJ 511 as follows:

> [26] ... On the facts of that case we agree that the title of Ng See Chow is defeasible under S.340(2) of the NLC as he obtained his title through a forged instrument. However, we are of the opinion that the appellant bank, **being the holder of subsequent interest in the land is protected by the proviso to s. 340(3) of the National Land Code.** For that reason, we are of the view that the finding of Court of Appeal in that case is to that extend flawed. (emphasis added)

[61] The position of a purchaser in good faith and for valuable consideration was explained in *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors and Other Appeals* [2008] 6 CLJ 626 at p. 641; [2008] 6 MLJ 672 at p. 684 by the Court of Appeal through His Lordship Richard Malanjum JCA (now CJSS) as follows:

> [41] ... The proviso says that any purchaser in good faith and for valuable consideration or any person or body claiming through or under him is excluded from the application of the substantive provision of sub-s (3). For this category of registered proprietors, *they obtained immediate indefeasibility notwithstanding that they acquired their titles under a forged document even if the instrument of transfer was forged, the respondent nevertheless obtained an indefeasible title to the said land.* Thus, **being a purchaser in good faith and for valuable consideration** having paid within the stipulated time the balance of the purchase price arising from the public auction sale, the second intervener had acquired an indefeasible title or interest to the said land upon being registered as the registered proprietor. (emphasis added)

[62] The plaintiff cannot prove fraud against the intervener bank by inference or imputation because of certain things done or not done. Learned counsel for the plaintiff, Miss Lucia Minta harped on the fact that there was no prior valuation report was obtained before the loan was approved. I can accept the evidence of IW1 the then branch manager Mr Au Yeong that where they know the market value of the property there was no need for a valuation report. The loan was only for a RM184,000 and any additional costs of the valuation report would have to be passed down to the borrower. At any rate the purchase price was about RM205,000. Further the fact that the bank had not requested the first defendants to submit a cash-flow report of their business cannot in any way be equated with conspiracy on the part of the bank to defraud the plaintiff. There is no benefit the bank would derive and every possibility of the charge being set aside.

[63] It would be apposite to repeat the words of the Court of Appeal in *Teh Cheng Choo v. Malayan Banking Bhd* [2009] 5 CLJ 463 at pp. 469-470 speaking through His Lordship Hamid Embong JCA (now FCJ) when arriving at a similar finding of facts on the part of the bank:

A [22] The learned trial judge also considered the evidence was found in the appellant's affidavit supporting her OM. Her Ladyship concluded that although there were references to fraud, cheating and misrepresentations, these were allegations made against the D1 and not Maybank. We are in agreement with the trial judge's finding that the appellant had failed to establish that Maybank was a party or privy to the alleged cheating or fraud or had any notice of the alleged fraud ...

[27] ... Since the sole question was the defeasibility of Maybank's title under s. 340(2)(a) NLC, *the learned judge had correctly determined it pursuant to the proviso of subsection (3) ie, that Maybank now stood as a bona fide purchaser whose title cannot now be impugned.* The question of deferred indefeasibility of the title was thus also not in issue. (emphasis added)

Whether The Plaintiff Can Still Be Registered Owner Of The Apartment G15 Subject To The Charge In Favour Of The Bank

[64] At first blush as the interest of the bank is indefeasible, it would appear that nothing can be done which would result in compromising the charge of the bank. However the first defendants cannot be allowed to profit from their wrongs in that as the charge is indefeasible, they might still deprive the plaintiff of her rightful title by one day fully discharging the charge and obtain yet an indefeasible title to the apartment. That would be to add insult to injury. What the bank has acquired is only an interest over the apartment and not the title to the apartment G15.

[65] A more appropriate order to explore would be to order the first defendants to transfer apartment G15 to the plaintiff but subject to the charge to the bank. Alternatively the plaintiff can be given the option to redeem the apartment and the amount so incurred shall be deemed as judgment entered by the plaintiff against the first defendants.

[66] This anomaly was appreciated by the High Court in *Owe Then Kooi v. Au Thiam Seng & Anor & Another Case* [1990] 1 CLJ 311; [1990] 2 CLJ (Rep) 600; [1990] 1 MLJ 234 at p. 239, where His Lordship Abdul Malek J (as he then was) wrestled with the issue as follows:

I am inclined to hold that the proviso to sub-s (3) eliminates the necessity of the purchaser in good faith and for valuable consideration applying to set aside the defeasibility and it follows that from the facts of the present case, the title to the property had reverted to the plaintiff but the interest remains vested in the second defendant. This would mean that I should have granted order in terms for the second defendant's application as plaintiff in the originating summons to foreclose the property. I may have been in error here but, to my mind, *it would be disastrous to find a subsequent innocent chargee to have a better right than the defrauded registered proprietor with the title who was not party or privy to any of the situations that made the title or interest defeasible* in the light of *Quah Hong Lian Neo*'s case [1936] MLJ 203. As between them, even if the charge is held to be valid, the position would be that the chargee acquired only an interest in and not a title to the land and the registered proprietor of the charged land can in fact further sell the land to a third party who will take it subject to the registered lease or charge. (emphasis added)

Pronouncement

[67] In the upshot this court held that the transfer of the two units of apartments in G15 and G16 to the first defendants and the refusal to now transfer back to plaintiff was in fraudulent breach of the trust and so this court made the necessary orders with respect to prayer 13.1.(a)(i) for a declaration that the plaintiff is owner of G15 and prayer 13.1(a)(ii) that plaintiff is the owner of G16, and also prayer 13.1(b)(i) and (ii) vacant possession of G15 and G16.

[68] Consequential orders were made with respect to prayer 13.1(b)(iii) for an order that the first defendants sign a valid Transfer Form 14A and other documents with respect to apartments G15 and G16 in favour of the plaintiff failing which the SAR of the Ipoh High Court, Perak shall be authorised to sign on the first defendants' behalf.

[69] The consequential order with respect to prayer 13.1(b)(iv) for an order that the first defendants do deliver the original Strata Titles No. PN 3876/M34/4/63 and PN 3876/M34/4/64 within seven days of the order herein together with supportive documents including the original sale and purchase agreements and charge documents is subject always to the charge to Public Bank Berhad.

[70] I also granted prayer 13.1(c) for an injunction to restrain the first defendants from transferring, charging or in any way of dealing with the said apartments.

[71] There is an excess of RM178,000 which the plaintiff has proved that she had paid D2 and so judgment was entered against D2 for the sum of RM178,000 with interest at 5% per annum from date of writ to realisation.

[72] I then considered the assessment of damages between the plaintiff and the first defendants. For Unit 15, as the plaintiff was staying there all along and no evidence that she had suffered any loss other than not been able to charge the Unit which D1 had charged to the Bank, I had assessed damages at RM5,000.

[73] As for Unit G16, she had been kept out since 21 May 2007 till now for almost six years. Going by a return of 5% per annum on the apartment which is not unreasonable, it worked out to about RM10,000 per year and so I assessed damages at RM60,000 as the plaintiff could have let out the unit herself and earn the rental income. Interest shall run at 5% per annum from date of writ till realisation.

[74] With respect to the charged unit G15, the said unit shall be transferred back by the first defendants to the plaintiff within 14 days subject to the charge and the first defendants are hereby ordered to pay to the bank the redemption sum for the unit to be so discharged. The redemption sum is currently at RM211,007.24 as at 31 December 2012 with accruing interest. The plaintiff shall be at liberty to pay this or such other redemption sum as may be accrued to get a full discharge of charge and such sum paid shall be deemed as judgment entered and enforceable against the first defendants.

[75] All legal fees, costs and expenses for the redemption and transfer back to the plaintiff of the two apartments shall be borne by the first defendants.

[76] For completeness of record, the plaintiff shall pay to Mrs Masaki Michika the sum of ¥4 million being the contribution by her towards the purchase of the two apartments.

[77] Damages shall be assessed by SAR against D2 for fraudulent breach of trust.

[78] As for costs, after hearing submissions I had assessed as follows:

[79] The first defendants shall pay the sum of RM40,000 to the plaintiff. The plaintiff shall be allowed the usual judgment in default costs against D2.

[80] Further the first defendants shall pay the costs of RM20,000 to the intervener bank.